

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1432

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
CRIMINAL #N76-5

B
P/s

UNITED STATES OF AMERICA
Appellee,

-v-

RICHARD WASHINGTON, et al.
Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF CONNECTICUT

B R I E F F O R T H E A P P E L L A N T

KENNETH W. SALAWAY
Attorney for appellant
Office & P. O. Address:
125-10 Queens Blvd.
Kew Gardens, N.Y. 11415
Tel. #212-793-2700

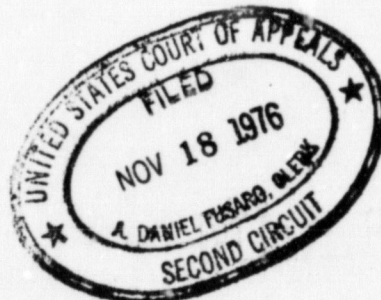


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT: CRIMINAL TERM

-----X
UNITED STATES OF AMERICA,

Appellee,

-v-

RICHARD WASHINGTON,

Appellant.

-----X

PRELIMINARY STATEMENT

Richard Washington appeals from a judgment of conviction entered in the United States District Court for the District of Connecticut on September 17, 1976 after a trial before the Honorable John Newman, United States District Court Judge sitting with a jury.

Indictment N-76-5 charged the defendant along with Arthur Hendrix, David R. Lewis and David Williams, in violation of 18 U.S. C-2113 (a) (b) (d) to (a) and 371.

The indictment charged that on or about September 20, 1973 the above named defendants robbed the West Side office of the Connecticut National Bank in Stamford, Connecticut, and in the process of robbing said bank placed lives in jeopardy by use of dangerous weapons and stole in excess of \$100.00 from said bank.

On June 2, 1976 a trial was held before the Honorable John Murphy, United States District Court Judge for the District of Connecticut, with a Jury. The trial ended on Saturday June 5, 1976 after the jury was unable to reach a

verdict. On August 2, 1976 a second trial began before the Honorable John Newman with a jury and was completed on August 6, 1976 when the jury returned a judgment of guilty as to each count of the indictment and as to each defendant.

On September 17, 1976 the appellant Richard Washington, was sentenced by the Court (Newman, J.) to a term of imprisonment not to exceed ten (10) years.

STATEMENT OF FACTS

Prior to the selection of jury, counsel for the appellant moved for a severance pursuant to Rule 14 of the Federal Rule of Procedure. The grounds for the motion was that the defendant Richard Washington would be prejudiced by being tried with the defendants, David Lewis and David Williams; because it was the intention of David Williams to testify on his own behalf at the trial and would be cross-examined as to his participation in a trial against Richard Washington in the Eastern District of New York, in June 1974. At that trial, he testified, as a government's witness, that Richard Washington committed a bank robbery in August of 1973 in Garden City, New York. The court denied the motion on the grounds it was premature. (T 4-9)

After the selection of the jury, the first witness called by the prosecution was Arthur Hendrix.

ARTHUR HENDRIX testified that on September 20, 1973 he participated in a robbery of the West Side office of the

Connecticut National Bank along with Aaron Stewart, David Lewis, Joseph Daniels, David Williams and "T.C." (identified by the witness as Richard Washington). (T 31)

That in August or September of 1973 he spoke to a friend of his known as Joe Daniels about making some money. He was then introduced to David Williams and David Lewis by Daniels. That on or about September 19, 1973 the witness met with Joseph Daniels, David Williams, David Lewis and Aaron Stewart at Francis Lewis Boulevard in Queens County where there was a discussion about committing a crime. David Williams and Joe Daniels decided they were going to get overalls, masks and gloves and asked everyone for their sizes. Joseph Daniels and David Williams also said everyone was to have guns. A later meeting on the subject was held at 122nd Street in Harlem, with the same parties present. The witness received at that meeting a greenish colored jumpsuit, pair of gloves and a ski-mask and was told to steal a car for the getaway. (T 36-42)

The next morning all the participants including Richard Washington, met at Francis Lewis Boulevard in Queens County whereupon the witness told the others he had not stolen a car. He was told to find one so he left with David Lewis and returned shortly thereafter with his step-mother's car, a four door, 1969 Buick Skylark. (T 43-46). The other participants had the following cars: David Williams, Oldsmobile Cutlass; Richard Washington, black Lincoln

Continental; David Lewis, Buick Electra; the witness, Buick Electra; and Joseph Daniels, the witness' stepbrother, Buick Skylark. With these cars the participants of the bank robbery proceeded up to Connecticut. (T 47-48)

That upon leaving the Connecticut Turnpike, they all stopped at a parking lot. Richard Washington, David Lewis and David Williams left while the witness remained. When Washington, Lewis and Williams returned, they all proceeded to the bank. Aaron Stewart and David Lewis went through the back of the bank, while the witness and David Williams entered the front of the bank while Richard Washington parked the getaway Skylark in the driveway of the bank. (T 49-51) Upon entering the bank, Hendrix placed his ski mask over his face. While Hendrix and Stewart collected the money from behind the counters, Williams and Lewis held the tellers and customers at bay with a pistol and shotgun. When they left the bank, they did not immediately see Richard Washington with the getaway car, but after waiting a few moments Washington arrived and they drove off with the Skylark. (T 51-56)

That a few blocks from the bank they left the Skylark and proceeded to New York in the vehicles left in the parking lot adjacent to the Connecticut Turnpike. Upon returning to New York, the witness proceeded to an employment agency to fabricate an alibi and then to Joseph Daniels home in Queens to get his share of the money. At Joseph

Daniel's home he was met by David Lewis, David Williams, Aaron Stewart and Joseph Daniels where he received eleven (11) to fifteen (15) hundred dollars for his share in the proceeds of the bank robbery. (T 57-65)

Arthur Hendrix further testified that he had previously been convicted for a drug sale in 1970 in Queens County and a bank robbery in 1973 for which he received a sentence of two and one half years. (T 30-34)

He further testified that Richard Washington was clean shaven on September 20, 1973. (T 94)

JULIAN JEFFERSON testified that on August 31, 1973 he committed a bank robbery with David Williams, David Lewis, Moses Scarborough, Joseph Daniels, and Richard Washington. The bank was the Long Island Trust Company in Garden City, Long Island. David Williams went into the bank armed and covered the customers as did Julian Jefferson, while David Lewis and Moses Scarborough jumped the counters and took the money in the tellers cages. Richard Washington's task was to drive the second getaway car and Daniels the third getaway car. When leaving the bank, the witness told the jury that Richard Washington was not at the predetermined place for the second getaway car and they had to proceed toward the highway where they caught up with Washington. They then switched the money and guns to Washington's car and left for Queens where they split up the proceeds of the bank robbery and David Williams and David Lewis discussed committing a

bank robbery in Stamford, Connecticut. (T179-187)

Jefferson further testified that he had been convicted in the past about twelve times for robbery, burglary and drugs as well as for the bank robbery of the Long Island Trust Company for which he was sentenced to five years incarceration. That after he testified at the first trial in June of 1976 a letter was sent on his behalf to the Parole Board by the U.S. Attorney's Office relating to his cooperation in this matter. (T 175-178)

CHRISTIAN BASSICK testified that he is employed as an Internal Auditor with the Connecticut National Bank. That after the bank robbery of September 20, 1973 he performed an audit at the said bank which is insured by the Federal Deposit Insurance Corporation and found that \$12,268.99 had been taken. (T 243-246)

MARGARET PERRY testified that she was a teller employed by the West Side office of the Connecticut National Bank on September 20, 1973 and observed the bank robbery. She saw three or four people enter the bank while putting hats over their faces and saying, "This is a holdup." "Don't move." Then they jumped over the counters and one stood in front of the customers and the tellers. They were wearing dark suits and dark ski masks. The man holding the gun was standing in front of the witness and a very frightened elderly lady. (T 248-253)

DONNA BUCETTO testified that she was a teller employed by the West Side office of the Connecticut National Bank on September 20, 1973. That about 9:15 a.m. she observed three men walk in the front door of the bank and one from the back. They were dressed in blue coveralls and had ski masks on their heads as well as having guns. (T 264-266)

CARMEN FARFAGLIA testified on September 20, 1973 he was at the drive-in window at the West Side office of the Connecticut National Bank making a loan payment when he observed the girls in the bank standing straight and someone jumped over the counter. He got out of his car, looked into the bank window and saw two men putting money into plastic bags. He ran across the street and called the police. When he returned he saw four men with plastic bags get into a late model Buick. At about 10:00 or 10:30 a.m. he was taken by the police to a location near the Connecticut Turnpike where he identified the late model Buick and saw ski masks and gloves recovered from the car. (T 270-273)

AS THIS POINT A STIPULATION
ENTERED INTO BETWEEN COUNSEL FOR
THE GOVERNMENT AND THE DEFENSE
WAS READ TO THE JURY.

STIPULATION

"that if Special Agent Conover with the FBI were called as a witness he would testify first of all that the ski masks and the gloves that have been introduced into evidence were found both in the car, some of them were

found in the car and others in the vicinity of the bank along the getaway route."

"Secondly, that Government Exhibit 12, which is a photograph represents a sales slip dated September 19, 1973, that was found in the vicinity of the bank as well." "Additionally, that the gloves and the hats that are into evidence were sent to the FBI laboratory in Washington for laboratory analysis and the results of that was that Negroid hairs were found in the masks and that in one of the gloves was found Caucasian limb hair." (T273)

RAYMOND QUIST testified that he holds a Doctorate Degree in speech pathology. That he has a patient, the co-defendant, David Lewis, and had been treating him for a stuttering defect. Upon being asked his opinion if one with such a defect could speak properly, he stated he could with a probability of 60 to 70%. (T 279-281)

AT THIS POINT THE GOVERNMENT RESTED ITS
CASE IN CHIEF.

DEFENDANT-WILLIAMS' DEFENSE

CHARLES SPRUILL testified he is the step-brother of Arthur Hendrix. That on September 20, 1973 he was at his girl friend's house in Queens and that he discovered his car missing at about 8:30 in the morning. That he reported it stolen to the police at approximately 10:55 a.m. (T 287-289)

SHIRLEY WILLIAMS testified that she is the defendant Williams

wife and that on September 20, 1973 he was employed at 122-1/2 in Manhattan in a numbers house. That on that date her husband left for work at 9:30 a.m. That a birthday party was to be given that night for her mother-in-law, but she did not attend. She further testified that she had been convicted for the crime of conspiracy to commit bank robbery for being the driver of a getaway car for her husband David Williams during a bank robbery. (T298-312)

GLORIA BURNETT testified that she was a girl friend of David Williams and that his mother did celebrate yearly birthday parties with the family. But that in 1973 she did not attend nor does she recall seeing David Williams on September 20, 1973 at 9:30 a.m. to remind her of the birthday party. (T329-337)

DAVID WILLIAMS testified that he was 32 years of age and was presently incarcerated. That he had previously been convicted of robbery in Queens County, robbery in Denver, Colorado, Manslaughter in Queens County, and seven (7) bank robberies in the Southern and Eastern District of New York. That although he had committed other bank robberies, the defendant contended he did not commit the bank robbery in Stanford, Connecticut. (T340-386)

On Cross-examination the Government questioned David Williams regarding his testimony as a Government witness in the trial of the appellant relating to the robbery of the Long Island Trust Co., over the objection of counsel.

(T419-424).

After the testimony of David Williams, the defense for David Williams, rested.

DEFENSE OF RICHARD WASHINGTON

Richard Washington called as his first witness, AARON STEWART. Notwithstanding the fact that Aaron Stewart had told both the Federal Bureau of Investigation and the counsel for the defense that Richard Washington had not committed the bank robbery, the Court sustained Aaron Stewart's right to the privilege against self-incrimination. (T459-470, 48, 491)

YVONNE WASHINGTON testified that she is the sister-in-law of Richard Washington. That on September 20, 1973 she was in the home of Richard Washington at approximately 9 o'clock in the morning. While at the home she had coffee with the appellant's wife and at that time observed Richard Washington in the home. (T491-501)

JAMES HENRY BARNES testified that he is the brother-in-law of Richard Washington. That on September 20, 1973 he was living with his wife at the Washington residence in Queens County, New York. That on that date he went to work at the Belmont Race Track at approximately 5:00 a.m. and returned home at approximately 9:00 a.m. at which time he observed the appellant Richard Washington in the home. After talking to

him for a while, they both proceeded to take a ride to get a toilet bowl for the bathroom. He recalls the day as being September 20th because the toilet bowl had to be fixed for the birthday party that was to be held on September 21, 1973 for his wife. (T502-512)

MILTON E. AHLERICH testified that he is an employed as a special agent for the Federal Bureau of Investigation. That on January 10, 1974 he caused to take the photograph of Richard Washington. That photograph was offered into evidence showing Richard Washington with a full grown beard. (T512-515)

ROBERT A. ANDERSON testified that he is employed as a correction officer at the Nassau County Sheriff's Department. That in the summer of 1973 he took a picture of Richard Washington which was offered into evidence and showed Richard Washington with a beard. (T518-520)

He further testified that in October or November while at an American Legion dance at the International Hotel at Kennedy Airport, he was photographed with Richard Washington and other friends. Said photograph was offered into evidence showing Richard Washington with a beard. (T521-522).

AT THIS POINT THE DEFENSE OF RICHARD WASHINGTON, RESTED.

POINT I

THE COURT ERRED IN SUSTAINING AARON STEWART'S PRIVILEGE FROM SELF-INCRIMINATION WHEN HIS CASE HAD BEEN DISMISSED AND IT WAS REMOTE AND SPECULATIVE THAT HE COULD OR WOULD BE PROSECUTED BY CONNECTICUT STATE AUTHORITIES.

At the inception of the trial, it was learned that Aaron Stewart had spoken to a special agent from the Federal Bureau of Investigation and had stated that David Williams, David Lewis and an unknown black had committed the bank robbery in question. (T19-28) After his arrival in Court, counsel for the defendants Washington, Lewis and Williams spoke to Stewart and learned that Stewart did not wish to testify for the Government or the defense. But during the conversation Stewart stated that Richard Washington was not the unknown black that committed the bank robbery; that he knew Washington from the Federal House of Detention and that he did not commit the bank robbery.

Aaron Stewart was called as the appellant Washington's witness and at that time claimed his privilege of self-incrimination when any questions were asked about the bank robbery and the surrounding circumstances leading to his being called as a witness. The Court sustained his right to the privilege on the grounds that even though his case was dismissed and could not be tried again, he could be prosecuted by the State. The Court was in error and should have required

the witness to answer the questions propounded by Washington's counsel.

It is well settled law that a witness has the right to refuse to answer questions that may incriminate him. Bellis v. United States 417 US 84 (1974); Tehan v. United States ex rel Shott, 382 US 406 (1966); United States v. Noble 95 S. Court 2160 (1975); Application of Gault, 387 US 1 (1967). And that, this right should be accorded a liberal construction. Spevak v. Klein 385 US 511 (1967). But although this right protects a witness from both federal as well as state prosecutions, the privilege must only protect the witness from real dangers not remote and speculative possibilities. Zicarelli v. New Jersey State Commission of Investigation, 406 US 472 (1972); Donaldson v. United States, 400 US 517 (1971).

In the case at bar, the witness, Aaron Stewart, had his case dismissed, after a jury was selected in June 1976. (Murphy, J.) Thereafter he was returned to Atlanta Federal Correctional Facility to complete his prison term for other crimes. This crime occurred in September of 1973, was not tried until June of 1976 and no action of any kind had been initiated by any State court for the possible crime of possession of a weapon. After the bank robbery was dismissed the entire months of June and July passed before Stewart was brought to Connecticut on this matter and again no action was brought by the state. It is clear that the witness could have been compelled to testify regarding this crime since his case

had been dismissed. United States v. Johnson, 488 F 2d 1206; United States v. Sanchez, 459 F 2d 100 (2nd Circuit 1972); United States v. Gernie, 252 F 2d 664 (2nd Cir. 1958); United States v. Romero, 249 F 2d 371 (2nd Cir. 1957); United States v. Cioffi, 242 F 2d 473 (2nd Cir. 1957).

The Government's claim that this witness could be prosecuted for possession of a weapon in the state court was remote and speculative. Almost three years had elapsed since the commission of the crime and two months elapsed since Stewart's dismissal of the bank robbery charges. It would seem that unless the Government attempted to persuade the state authorities to press charges, no charges would be forthcoming. The Government used this very tenuous argument regarding state prosecution to prevent Washington from using a witness that would be exceedingly helpful in his defense. The only witness against Washington as an accomplice, Arthur Hendrix. Only Hendrix could and did testify that Washington perpetrated this bank robbery with him. The testimony of Stewart would probably have led to a reasonable doubt in the jury's mind. Where the testimony was so crucial and the right to the privilege rested on such a speculative and remote ground, the Court should have denied the privilege to the witness and compelled him to answer.

POINT II

THE COURT ERRED IN NOT GRANTING
THE APPELLANT WASHINGTON A SEVERANCE.

Rule 14 of the Federal Rules of Procedure states,

"If it appears that a defendant....
is prejudiced by a joinder of....
defendants in an indictment..., the
Court may....grant severance of defen-
dants or provide whatever other relief
justice requires."

In the case at bar, counsel for the defendant moved under Rule 14 of the Federal Rules of Procedure for a severance prior to trial. This motion was denied on the grounds that it was premature. Thereafter the motion was renewed during co-defendant Williams testimony. It was again denied although the testimony elicited through the cross-examination that followed in no way enhanced the Government's case against Williams but did substantially assist the Government's case against the appellant Washington. (T406-415)

Washington had been tried in June of 1973 regarding a bank robbery that occurred at the Long Island Trust Company, Garden City, New York. The only two eye witnesses that were called by the Government were the co-defendants Julien Jeffers and David Williams. Both testified that Washington committed that crime. Although the trial resulted in a conviction, a subsequent motion for a new trial was granted and the Government dismissed the case. On the first

trial of the case at bar, Williams testified in his own behalf and was questioned about Washington's involvement in the Long Island Trust Company, over counsel's objection, and the same cross-examination occurred in this case. (T419-424) The purpose of the cross-examination relating to Washington's alleged participation in a bank robbery that was dismissed against him, was to reinforce Julian Jefferson's testimony and to show the character of the person of the appellant in contradiction of Rule 404 (b) of the Rules of Evidence Title 28 USC.

The court ruled that this testimony was admissible in evidence against the appellant because if the Court granted the appellant a severance, the Government could subpoena David Williams and elicit the same testimony from David Williams on a separate trial. Counsel for Washington argued that it was highly speculative that the Government could or would call Williams on a separate trial if the appellant was granted a severance.

Subsequent to the trial, David Williams sent a letter to Judge Newman (a copy of which is annexed to the Appendix under Tab "D") stating that he committed the bank robbery in question, but neither Washington or Lewis participated. If a new trial had been granted to the appellant, it is clear from the letter that was sent by Williams to the Court, that the Government would not have called Williams as a witness and the grounds upon which

the Court denied the severance would be ill founded. The continual pounding on cross-examination by the Government into Washington's involvement in the prior bank robbery through Williams' testimony severely prejudiced Washington having a fair and impartial trial. The probative effect was negligible while the preudicial effect was very substantial.

It is for the above reasons that the Court erred in not granting a severance to the appellant.

CONCLUSION

In a case that relied entirely on the testimony of an accomplice where proper evidence is withheld from the jury and improper evidence is heard by the jury, a conviction should be reversed. In this case, Richard Washington was entitled to a severance. The cross-examination of Williams regarding his testimony at Washington's trial was improperly offered into evidence and accepted by the Court. It's probative effect was farly outweighed by the prejudicial effect on Washington.

The testimony of Aaron Stewart, another accomplice in the bank robbery, would have been exceptionally helpful to the defense of Richard Washington. Since Stewart's case had been dismissed and the chances of state prosecution remove and speculative, the Court should not have sustained his privilege against self-incrimination and should have required him to testify as to Richard Washington's lack of participation in the bank robbery. These two errors committed by the Court taken together created a highly prejudicial atmosphere against Richard Washington in a trial where the Government's case was exceptionally weak. If the testimony of Aaron Stewart had been admitted and Williams cross examination regarding Washingtons involvment in the Long Island Trust Company robbery had not been admitted, the likelihood of Washington's acquittal would have been great.

In the event that the Court had granted Washington's motion for a severance, the likelihood of his acquittal would have been exceedingly great. Washington would not have had the burden of defendant Williams taking the stand and presenting an alibi defense (which had not been used in the first trial in June) similar to Washington's alibi defense, nor would Williams been cross-examined on the issue of his testimony at Washington's original trial in 1973.

For all of the above reasons, the appellant's conviction should be reversed and a new trial granted.

RESPECTFULLY SUBMITTED,

KENNETH W. SALAWAY
Attorney for appellant
Richard Washington

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK:

: ss:

COUNTY OF QUEENS :

ANN ROSENTHAL, being duly sworn, deposes and says:

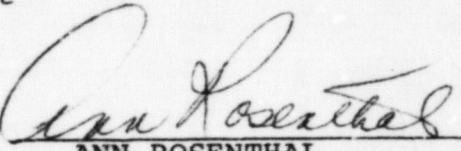
I am not a party to the action, am over 18 years of age and reside at Queens County, New York.

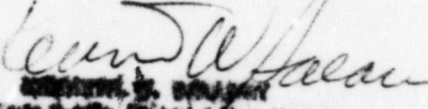
On the 17th day of November, 1976, I served a true copy of the annexed Brief in the following manner:
By mailing the same in a sealed envelope, with postage pre-paid thereon, in an official depository in the United States Postal Service addressed to:

Hon. James Pickerstein
Deputy US. Attorney for the
District of Connecticut
New Haven, Connecticut

Sworn to before me this

17th day of November, 1976


ANN ROSENTHAL


Notary Public, State of New York
My Comm. Expires 12/31/77
Office: 110-11 Queens Blvd.
Queens, N.Y. 11375